THE CONSTITUTIONS OF THE STATE OF NEW YORK. II.[1]

THE convention of 1846 had faith in the sufficiency of the canal revenues to defray the canal and state debt and to accumulate a fund for canal improvements. The alarm of the distinguished chairman of its committee on finances and canals (Michael Hoffman) lest the revenues from the canals might prove inadequate even to pay the debts, was groundless. The state actually paid the canal and general debt several years before the expected time of payment. In 1854, an amendment was added to the constitution which required the appropriation of all the canal revenues not needed for repairs and superintendence to the enlargement of the Erie, Oswego, Cayuga and Seneca canals, to the completion of the Black River and Genesee Valley canal and to improvements in the lockage of the Champlain canal. It also directed an annual appropriation of not more than $2,250,000 to the same objects for the ensuing four years.

The expenses of enlarging the Erie canal swelled its total cost to about $52,500,000. The Erie canal has returned an even larger sum into the state exchequer; and not only has it been a financial success, but it has proved one of the great factors in augmenting the population and developing the resources and wealth both of this state and of the territory about the Great Lakes.

In the year 1862, the revenue from the canals attained its maximum, the tolls collected in that year exceeding $5,000,000. After that date the amount declined, rates having been forced down by railroad competition. In 1882, the people of the state voted the abolition of all canal tolls and made provision for the liquidation of the existing canal debt by means of taxation.

[1] Continued from POLITICAL SCIENCE QUARTERLY, III, 3 (September, 1888), p. 489.

As the constitution now stands, the greatest of these water ways are the inalienable property of the people and are free.

The Constitutional Convention of 1867.

In accordance with article xiii of the constitution of 1846, the question was submitted to the people of the state, at the general election held in 1866, whether a convention should be called to amend and revise the constitution. The question was decided in the affirmative, by a vote of 352,854 in favor of a convention to 256,364 against it. In the following winter, the legislature of the state passed a law providing for the election of 128 delegates from the various senatorial districts of the state and also for the election of 32 delegates for the state at large. The plan adopted by the legislature for the election of delegates at large introduced the principle of minority representation. No elector was permitted to vote for more than 16 of such delegates; a provision which secured the election of 16 Democratic and 16 Republican delegates at large. Of the district delegates the Republicans had a majority; so that they were able to elect the president of the convention and, to a certain extent, to control its committees. The epoch was not favorable for the holding of a constitutional convention, as partisan feeling then ran very high. The conflict between President Johnson and the Congress of the United States had reached its culmination, and the country was disquieted with the excitement which this contest had produced. The presidential election was near at hand, and it was evident to political managers that slight circumstances might turn the scale.

In this convention, as in all the earlier ones, the lawyers were in a large majority; and among them were some of the most prominent lawyers in the state. Horace Greeley, George William Curtis and Erastus Brooks were also delegates. Some of the ablest men in the convention had been chosen as delegates at large. Hon. William A. Wheeler was elected permanent chairman; and he presided very ably and impartially. The convention assembled on the first Tuesday of June, 1867, and terminated its labors on the 28th of February, 1868.

Debate in the convention took an exceedingly wide range. Among the topics which received long and thorough discussion were the right of colored citizens to vote on equal terms with white men, a subject which had engaged the attention of the conventions of 1821 and 1846; female suffrage; minority representation; taxation; the appointment instead of the election of judges, district attorneys and state officers; special legislation; emancipation of cities; bribery; education; intemperance.

The convention proposed to abrogate property qualifications for colored voters; but this proposition, although separately submitted to the people at the election of 1869, was defeated; 282,403 voters insisting on the retention of the qualifications, and only 249,802 voting for their abolition. The old restrictions on colored voters therefore continued in force until they were overridden by the fifteenth amendment to the national constitution.

In some respects the convention of 1867 exhibited a marked reaction from the decentralizing spirit which animated the convention of 1846. This disposition is chiefly observable in its treatment of the mode of selection and term of senators; in its return to county representation in the Assembly, partly abandoned in 1846; in its lengthening the judicial term and providing for the election of the entire Court of Appeals upon a general ticket, and in its debates upon the proposition to appoint state officers and district attorneys. Upon the other hand the amendment which it reported, conferring increased legislative functions upon county boards of supervisors, was a further advance in the line of decentralization.

When the convention of 1846 determined to break the state up into thirty-two Senate districts, it did so in obedience to the demand of localities for separate representation in each house. It was then seriously argued that under the constitution of 1822 candidates had been chosen to the Senate for whom voters never intended to cast their ballots. One illustration frequently pressed into service related to a youthful candidate for senatorial honor, who was elected because many of his constituents in a distant part of his district had cast their suf-

frages for him in the belief that he was another and a maturer person of the same name. Since the development of the increased facilities for the dissemination of news which later generations have witnessed, such mistakes (if they ever occurred) are rendered well-nigh impossible. As a rule, under the former system, with the state subdivided into a small number of districts, men of great promise, if not of actual prominence, were chosen to the Senate. Comparison of the lists of fifty or more years ago with those of recent times shows the decline in the intellectual character of the upper house. Formerly men of the stamp of DeWitt Clinton, Ambrose Spencer, Martin Van Buren, William H. Seward, Silas Wright, Samuel Young, Samuel Beardsley, Alonzo C. Paige sat in the Senate, but their peers are not chosen to-day to the same office. So marked had the difference become even in 1867, that many of the delegates to the constitutional convention of that year argued in favor of returning to the small number of districts established in 1822. Small districts, they argued, were no more entitled to separate representation in the upper house than counties. Large districts would invite men worthy of representing the entire state and banish, at least from the upper chamber, the spirit of local jealousies and of log-rolling so potent in securing local legislation. To exalt the dignity of the office, it was proposed also to make the term four instead of two years, vacating one seat in each district every year, thus ensuring the choice of one-fourth of the Senate at each annual election. This plan had the support of the strongest minds in the convention, but it was only partially adopted. The constitution reported by the convention retained the thirty-two Senate districts, while it lengthened the senatorial term to four years. It provided that the first senators elected under the new constitution in the districts bearing odd numbers were to vacate their offices at the end of two years, those in the districts bearing even numbers at the end of four years, thereby securing the election of one-half of the Senate every second year.

When the subject of Assembly representation came up for debate, a majority of the delegates voted to return to county

representation as fixed by the constitution of 1821. The constitution of 1777 had provided for the election of assemblymen by counties, but it made the size of the Assembly dependent upon the growth of population, fixing the minimum membership at 70 and the maximum at 300. In 1801 the Assembly was limited to 100 members. In 1827 the unit of Assembly representation was ordained to be the county, but the membership was fixed at 128. A new unit of representation was introduced in 1846: the Assembly district. The constitution of 1846 required that members of Assembly should be apportioned among the several counties by the legislature as nearly as might be according to the number of their respective inhabitants, excluding aliens, and that they should be chosen by single districts. It then provided that every county theretofore established and separately organized (except the county of Hamilton) should always be entitled to one member of the Assembly, and that no new county should be erected unless its population should entitle it to a member. This complicated system was probably adopted because of the clamor of small districts for separate representation and of the reluctance of the least populous counties to risk loss of separate representation with the growth of the other parts of the state in population. But one great defect in this, the present plan, is the impossibility of giving all districts equitable representation, so long as county representation is adhered to and the Assembly remains a fixed quantity. Either the membership of the Assembly should vary with the population, or small counties should be merged together for purposes of Assembly representation. An extreme illustration will present the point: Population might be so distributed through the state that the counties of New York and Kings would contain three-fourths of the enumerated inhabitants. Each of the other fifty-eight counties (save Hamilton) would be entitled to one seat in the Assembly. Fifty-seven seats would therefore belong to the fifty-eight counties, but New York and Kings would then have only seventy-one seats, which would be much less than their *pro rata* on the basis of population.

Separate Assembly districts might perhaps better be abolished. They have not elevated the character of assemblymen. But even if separate districts should be retained in the rural counties, cities of more than a fixed population should elect their assemblymen at large and provision could easily be made enabling minorities to obtain adequate representation. It would be a great boon to the county of New York if all its assemblymen were chosen by all the voters of the county, instead of in districts controlled by district leaders. A ticket addressed to all the electors of the county would be more certain to contain good names and far less likely to contain bad or doubtful ones. Whatever objection may be urged to county representation in other parts of the state, there is no reason for electing assemblymen by districts in the cities of New York and Brooklyn. The interests of separate municipal districts do not differ at Albany. They may clash in a municipal board, but not in the state legislature.

An attempt was made in the convention of 1867 to prohibit certain classes of local and special legislation altogether, by restricting the power of the legislature to make laws for localities and by bestowing increased legislative functions on county boards of supervisors. Most of the delegates admitted that special legislation was an evil productive of confusion, log-rolling, extravagance and corruption, but the convention did not readily agree upon the remedy. The report of the committee having charge of this subject tended, in the opinion of its opponents, too much towards decentralization; in other words, if adopted, it would, they thought, create sixty local legislatures. Some, prominent among whom was the late Judge Folger, were convinced that the true remedy for special legislation was to prohibit absolutely the enactment of special laws upon any subject. On the other hand Professor Dwight pointed out, what has since been the experience of the state, that special legislation could not be utterly suppressed; and that, if it were made unconstitutional, it would inevitably be attained under the guise of laws general in form but really operative only in some particular locality, or of laws passed merely for the accomplishment of a special purpose.

The convention finally adopted an amendment clothing boards of supervisors with powers of legislation; but hardly any section of the new constitution was more debated or more amended than the section first proposed by the committee having charge of this subject. The convention also voted an amendment forbidding special legislation in a great variety of cases, which is similar to the amendment reported to the legislature by the constitutional commission appointed in 1872 and ratified by the people in the fall of 1873. It reported also an amendment prohibiting the legislature from passing any local or private bill, unless notice of intention to apply therefor should first have been given in a manner to be provided by law, and ordained that such notice should never be waived, but that the fact of omission of notice should always be open to inquiry. A substantially similar amendment was adopted by the commission of 1872, but failed to become law, as will be seen later.

The only work performed by the convention which was approved by the people was its amendment of the judiciary article. The new article reorganized the Court of Appeals, lengthened the term of judicial officers, and prepared two questions, relating to the appointment or election of judicial officers, for submission to the people at the election of 1873, a date sufficiently distant to allow the arguments for either method to be amply presented to voters. The convention was so nearly balanced upon the question of the respective merits of an appointive and an elective judiciary that it would have been unwise for a slender majority to commit the convention to either view. The question was therefore referred to the people, who decided at the annual election in 1873, by a large majority, in favor of electing judges of courts of record.

The judiciary committee, which was composed of some of the ablest lawyers in the convention, framed a judiciary article providing that judges of courts of record should hold office during good behavior or until seventy years of age. This report was exhaustively and ably debated but was not accepted by the convention. Had it been so approved, it might not have been approved by the people. It was admirably supported by some

of the most prominent lawyers in the convention, some of whom have since become judges. The convention finally compromised upon a term of fourteen years, which was adopted chiefly on the ground that this had been found by experience to be the average term of judicial officers under appointive systems. Unquestionably the best arguments favored a tenure to last during good behavior. If fourteen years is the average judicial term, reason prompts the extension of the term to a life tenure, because a life tenure does away with the motives which induce a judge to seek a re-election by corrupt or improper conduct, or by like means to provide for his future in default of re-election. It is clearly illogical to argue that if the average life tenure is fourteen years, the term should be fourteen years; the term should continue during life or good behavior.

This convention also reorganized the Court of Appeals. It reported a section providing that the court should be composed of a chief judge and six associate judges, to be chosen by the electors of the state upon a general ticket and to hold their offices for a term of fourteen years from and including the first day of January next after their election. This mode of selection, as well as the longer term, was a reaction from the decentralization of 1846. A commission was also created to decide the unfinished causes on the calendar of the retiring Court of Appeals. The commission consisted of the four judges of the old court and a fifth commissioner appointed by the governor and confirmed by the Senate. The amendment reorganizing the Court of Appeals and forming a commission of appeals, and the amendment extending the terms of all other judges of courts of record to fourteen years, were ratified by the people in the fall of 1869. In the following winter the legislature passed an act providing for the holding of a judiciary election in May, 1870, at which the members of the new tribunal were chosen. The chief judge and two of the associate judges of the newly constituted court had been among the most influential members of the convention.[1] The judges took the oath of office in July, 1870.

[1] Sanford E. Church, Charles J. Folger, Charles Andrews.

Generally such of the delegates as favored the appointment of judicial officers and a life tenure for the judiciary agreed in urging the appointment of state officers and of district attorneys, but a large majority of the delegates adhered to the elective system. The convention, however, reported an amendment to the constitution requiring that the secretary of state, comptroller, treasurer and attorney general should be chosen at the same time as the governor. This amendment found acceptance at the hands of the commission of 1872, but, though often mooted, it has never been ratified by the people. If such officers are to continue to be elected, their election should unquestionably be concurrent with that of the governor.

The arguments advanced upon the floor of the convention for the appointment of district attorneys seemed peculiarly apposite during the campaign in New York city in the fall of 1887. The popular movement which demanded Mr. Nicoll's nomination originated in fear lest the men then awaiting trial for alleged bribery had dictated the nomination of his opponent. A district attorney is a judicial rather than a political functionary. This view seems to have prevailed in the convention of 1821. District attorneys should certainly be singularly free from local political affiliations; and while an ideal system cannot be obtained, impartiality and independence in these officers would be best secured were they appointed by the governor and Senate and immediately removable for malfeasance by the governor.

The subject of municipal government received much consideration in the convention. The debate upon the conflicting reports from the committee on cities was protracted and to a certain extent partisan. The speeches of Mr. Harris, chairman of the committee on cities, and of Mr. Opdyke, also a member of the committee, presented the evils of city government and the remedies which were urged upon the convention in a clear and striking light. The majority report advocated a great enlargement of the powers of mayors of cities. It recommended that a mayor should have power to appoint heads of departments and officers charged with the administration of departments, and to remove at his pleasure all his appointees. It

proposed also to confer on cities absolute power of self-government and to forbid the legislature from interfering with their affairs except by passing general laws. Mr. Opdyke, in a minority report, urged the restriction of the elective franchise in local affairs as a pre-requisite to investing cities with local self-government. He proposed that the mayor and a portion of the common council should be elected by citizens having the right to vote for state officers, and that municipal boards of aldermen and comptrollers should be chosen by persons owning property valued at not less than one thousand dollars. Such a limitation upon suffrage would, in his belief, be sanctioned by the people of the state; without it he should be constrained to vote against every increase of governmental power of cities.

The convention voted to report that general laws should be passed for the organization of cities. It also adopted a provision to the effect that members of common councils should hold no other office in cities and that no city officer should hold a seat in the legislature. Beyond this, it contented itself with a section, drafted by Henry C. Murphy, the purport of which was that the mayor should be chosen by the electors of every city as the chief executive officer; that he should have power to investigate the acts of the various city officers and the right to examine them and their subordinates on oath; that he should also have power to suspend or remove such officers, whether they were elected or appointed, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal, but that no such removal should be made without reasonable notice to the officer complained of and an opportunity afforded him to be heard in his defence.

The financial article (article viii) remained substantially as in the constitution of 1846; but additions were made covering certain questions and a new section (15) was added, providing that real and personal property should be subject to a uniform rule of assessment and taxation.

Space will not permit a complete enumeration of the changes which were finally adopted by the convention. For a full list of these modifications, the constitution reported by the conven-

tion must be examined. A select committee of ten, of which Judge Folger was chairman, was appointed to draft an address to the people. The address describes the character of the changes which the convention proposed in the organic law of the state. The new constitution was submitted for public ratification at the general election of 1869 and was voted down. The vote in its favor was 223,935 to 290,456 against it. The only article of the proposed new constitution which was approved by the people was (as already stated) the judiciary article, which was submitted separately, the vote being 247,240 in its favor to 240,442 against it. Two other provisions were submitted separately: the proposal to abolish property qualifications for colored voters and the proposal to subject real and personal property to a uniform rule of assessment and taxation; but neither was ratified by the people.

The Constitutional Commission of 1872.

In his annual message in January, 1872, Governor Hoffman, after adverting to the proceedings of the recent constitutional convention and to the failure of the people to approve its work, recommended that a non-partisan commission of thirty-two eminent citizens, to be equally selected from the two great political parties, should be appointed to propose amendments to the constitution for ratification by the legislature and the people. The message contained a large number of valuable suggestions, nearly all of which are to be found in the constitution reported by the commission.

Pursuant to the governor's recommendation, the legislature of 1872 passed an act which the governor approved, authorizing him to nominate and with the advice and consent of the Senate to appoint a commission of thirty-two persons, four from each judicial district of the state, to propose to the legislature at its next session such amendments to the constitution (exclusive of the judiciary article[1]) as the commission might deem proper. The act provided also the mode of filling vacancies in

[1] By a subsequent act of the legislature, this restriction upon the commission was removed.

the commission, the place of its meeting, compensation of its members and various other incidental matters. In accordance with this enactment Governor Hoffman appointed thirty-two commissioners, some of whom, including George Opdyke, William Cassidy, Erastus Brooks and Francis Kernan, had been delegates to the convention of 1867. The commission assembled at Albany on December 4, 1872. Robert H. Pruyn was chosen chairman. Its sessions continued until March 15, 1873, when it adjourned *sine die*, after reporting a large number of amendments to the fourteen articles of the existing constitution and two new articles: one relating to municipal government, the other to the crime of bribery.

Although the powers of the commission were not as broad as those of the convention of 1867, there is a close correspondence in the changes proposed by the two bodies. While the convention of 1867 at various times brought a great number of topics under discussion, the actual outcome of its proceedings was not as fruitful of amendments as the work of the commission. Upon the subject of legislation, of the governor's veto, and particularly of municipal reform, the constitution reported by the commission went much further than the constitution reported by the convention.

Like the convention of 1867, the commission reported in favor of the abolition of all property qualifications for colored voters; and it reported, substantially, the amendment excluding bribers from exercise of the elective franchise which is to be found in the constitution adopted by the convention of 1867. The last amendment was ratified by the legislature and the people. The commission proposed also to increase the term of senators to four years and to divide the state into eight Senate districts, each of which should choose four senators, one every year; a change which had been proposed in the convention of 1867 but in part voted down, the convention of 1867 agreeing only to increase the senatorial term to four years. The commission further reported the prohibition of private, special or local legislation in thirteen enumerated cases. The clause containing these restrictions was adopted and is now section 18 of

article iii. Some of the best suggestions of the commission upon the subject of legislation were not approved by the legislature, and therefore were never submitted to the people for ratification; for example, a section requiring that every bill introduced into the legislature should be considered and read twice, section by section, in the Senate and Assembly; that every bill should have three readings, no two on the same day; that every bill and all amendments to it should be printed and distributed among the members of each house at least one day before the vote upon its final passage; that the question on the final passage should be taken immediately upon the last reading, section by section, and by yeas and nays to be entered upon the journals; and that the assent of a majority of the members elected to each house should be requisite to the passage of every bill.

Section 18, as reported by the commission, is as follows:

> No private, special or local bill shall be introduced in any regular session after sixty days from the commencement thereof without, in each case, the recorded consent of yeas and nays of three-fourths of all the members elected to the house in which such bill is offered; and no such bill shall be passed unless public notice of the intention to apply therefor and of the general objects of the bill shall have previously been given. The legislature, at the next session after the adoption of this section and from time to time thereafter, shall prescribe the time and mode of giving such notice, the evidence thereof and how such evidence shall be preserved.

The main purpose of this provision — which unfortunately was not approved by the legislature and therefore was never submitted to the people — was to inform the public as to all private bills introduced into the Senate or Assembly, and thereby to secure to those most interested in defeating the passage of a private bill ample opportunity to register their opposition to it. This was the first attempt in the state of New York to adopt the principle of the parliamentary standing orders which have proved an invaluable safeguard in Great Britain against the passage of improper private or local bills. In the matter of private legislation, as well as in ballot reform, the example of Great Britain is worthy of emulation. The passage of special legisla-

tion through Parliament is in the nature of a judicial proceeding. All private or special bills must be filed sixty days before Parliament convenes, and all whose interests such bills may affect adversely must be given ample notice to file objections. The promoters of all such bills are required to deposit sufficient sums to meet the expenses of the proceedings. The bills are then referred to special parliamentary committees, acting as judges; and if the objects of these promoters are approved, the bills must be made to harmonize with existing legislation before becoming laws.

The commission terminated the controversy which had perplexed the conventions of 1821, 1846 and 1867, as to the number of members of each house whose concurrence should be necessary to pass a bill over the governor's veto. The provision which it reported made the consent of two-thirds of the members *elected* to each house essential to the passage of a vetoed bill. It further reported that no bill should become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after the adjournment. These modifications were adopted by two legislatures and by the people, and form part of the constitution.

Another and much needed amendment reported by the commission, which has also found its way into the constitution, empowers the governor to veto one or more items of an appropriation bill, while approving all of its other features. The superior flexibility of the constitution of New York, as contrasted with the federal constitution, is shown by this amendment. The state has not suffered more from improper riders upon appropriation bills than the general government. But this pernicious practice on the part of Congress, though it was temporarily overthrown by President Hayes' resolute action in 1879, cannot perhaps be effectually suppressed without an amendment to the federal constitution, and such an amendment cannot be made without the consent of three-fourths of the states.

The commission proposed also that the governor's and lieutenant-governor's term should be increased to three years. This

amendment was ratified and is now part of the constitution. It also reported amendments to article v, which provided that the comptroller should be elected at the same time with the governor and for the same term, and that the secretary of state, attorney general and state engineer and surveyor should be appointed by the governor with the consent of the Senate and hold their offices until the end of the term of the governor by whom they should be nominated and until their successors should be appointed. These amendments to article v, not having been favorably received by the legislature, have never been voted upon by the people.

The commission proposed also that a superintendent of state prisons and a superintendent of public works should be appointed by the governor with the consent of the Senate for the like term, and that the state treasurer should be chosen by the Senate and Assembly in joint ballot, to hold his office for three years or until his successor should have qualified. Only two of these provisions were adopted by two legislatures and have met with popular approval; namely, those relating to the appointment of the superintendent of state prisons and the superintendent of public works. These are now embodied in the constitution. The amendment in the mode of electing the treasurer was defeated in the legislature. The commission also decided that the lateral canals had outlived their usefulness and were and would continue a burden to the state. They therefore recommended a modification of section 6, article vii, restricting the prohibition upon the sale, lease or other disposition of the canals of the state to the Erie, Oswego, Champlain and Cayuga and Seneca. This amendment has become part of the constitution.

The commission proposed also to amend section 4, article viii, of the constitution, by requiring the legislature by general law to conform all charters of savings banks or institutions for savings to a uniformity of powers, rights and liabilities, and that all charters thereafter granted for such corporations should be made to conform to such general law and to amendment thereto. No such corporation was to be permitted to have capital

stock, nor were the trustees to possess any interest, direct or indirect, in the profits of the corporation nor to be interested in any loan or use of money or property of such corporation. This amendment was ratified and is now in the constitution. The amendment eradicated an evil which had sprung from the creation of savings banks with stock, under special charters, without proper restrictions upon the investment of their funds. Some of these institutions, actuated by the desire to make large profits and declare handsome dividends, had taken risks entirely inconsistent with the nature of their business, to the great injury of depositors; and the temptation to such risks was increased by their having capital stock of which the directors or trustees could be holders.

Further amendments to article viii were reported by the commission in the shape of two new and most important sections (10 and 11). Section 10 in effect prohibited the state from loaning its credit or money in aid of any association, corporation or private undertaking, but expressly permitted appropriations for the benefit of the blind or of the deaf and dumb or of juvenile delinquents. Section 11 prohibited every city, county, town or village within the state from thereafter giving any money or property or loaning its credit in aid of any individual association or corporation, or from becoming directly or indirectly the owner of stock or bonds of any association or corporation; and further prohibited every such county, city, town or village from incurring any indebtedness except for county, city, town or village purposes. The section was not, however, to preclude provision for aid or support of the poor.

These sections were aimed at the latitudinary construction which courts, particularly those of the United States, had given to the powers of municipalities and towns, and were designed to terminate the disastrous system under which money and credit were loaned by cities to railroads and other private enterprises. Similar constitutional limitations were adopted about the same time in many other states. A new section (9) was also added to article x, providing that no officer whose salary is fixed by the constitution should receive any additional compen-

sation; that the compensation of other state officers should be fixed by law and neither increased nor diminished during their term; and that no state officer should receive to his use any fees or perquisites of office or other compensation. Article iii, relating to the oath of office, was also amended. Despite the stringent oath now required from legislators and the severe penalties enforced against all concerned in bribery at elections, the offence continues to be common. A just measure of ballot reform would do far more to eradicate the evil than stringent oaths or penal legislation.

All of these amendments were subsequently approved by two legislatures and ratified by the people.

The commission proposed two additional articles to the constitution: articles xv and xvi. Article xv related to municipal reforms. Article xvi related to bribery. This article (which closely resembles article xiv, proposed by the convention of 1867) was adopted and is article xv of the present constitution. The article makes it a felony for any person holding office under the laws of this state to receive any money except his legal salary, or any fees or perquisites or anything of value or of personal advantage or any promise of either, for the performance or non-performance of any official act or upon the express or implied understanding that his official action is to be influenced thereby. The article further provides that any person who shall offer or promise a bribe, if it shall be received, shall be deemed guilty of a felony and liable to punishment. The briber shall not be privileged from testifying upon any prosecution of the officer for receiving such bribe; but he shall not be liable to civil or criminal prosecution for offering the bribe if he shall testify to offering or giving it. Offering a bribe which shall be refused is made a felony. The article also permits either the briber or the bribed to testify in his own behalf in any civil or criminal prosecution for the bribery. Provision is also made that any district attorney failing to prosecute a person amenable under this article shall be removed from office by the governor, after due notice and an opportunity to be heard in his defence. Expenses incurred in any county in investigating and prosecut-

ing any charge of bribery or attempt at bribery within such county are made a charge against the state, and their payment by the state is required to be provided for by law.

But upon no topic before the commission was there a more urgent demand for action than upon that of municipal reform. The subject of abuses in municipal administration was not considered in the convention of 1821; for in that day cities were few in number and of comparatively small population; and, as they were managed by citizens possessed of property, such abuses as have become so familiar of late years had no existence. The opening of the door of universal suffrage in 1826 and the great immigration from Europe which followed some years later had, when the convention of 1846 assembled, injuriously affected municipal administration; but questions of more urgent (although not of more transcendent) importance occupied that body till the close of its sessions. The continued flow of population into cities, their increase in number and size, the relatively far greater increase in municipal debt and municipal taxation, the complicated and inconsistent character of municipal charters, the evil effects of constant legislative interference and of government by legislative commissions gave the problem of city government a significance in the convention of 1867 which it had never before possessed; but that convention failed to administer relief and the people failed to approve of the few provisions which it reported. In 1870, came the exposure of the Tweed frauds in New York city. Public sentiment then awoke, investigated the disease and demanded a remedy. The population of the cities of the state constituted one-half of all its inhabitants, and the valuation of property in municipalities amounted to three-fourths of that of the whole state. While economy had been steadily enforced in state government, corrupt and profligate expenditures had characterized city administration. In the city of New York, the municipal debt was $10,000,000 in 1840, $12,000,000 in 1850, $18,000,000 in 1860, $73,000,000 in 1870, and $117,000,000 in 1877; while taxation had increased from less than one-half of one per cent in 1816, or from about thirty-five one-hundredths of one per cent in

1836, to two and sixty-seven one-hundredths per cent in 1877, and this increase was exclusive of the sums exacted every year from property holders in the shape of special assessments upon property assumed to be specially benefited. A corresponding disproportionate increase of taxation and debt over population was observable all over the Union. According to the report of a commission appointed by the governor of Pennsylvania in 1877, statistics of the increase of population, valuation, taxation and indebtedness of fifteen of the principal cities of the United States, from 1860 to 1875, exhibited the following results: Increase in population 70.5 per cent; increase in taxable valuation 156.9 per cent; increase in debt 270.9 per cent; increase in taxation 363.2 per cent.

Apart from the fact that cities have undertaken the performance of many functions for the citizens which legitimately require the disbursement of great sums and that many cities have improperly lent their credit to private enterprises, the causes of these excessive expenditures must be sought in the difference in the treatment of cities and villages by the state; in the debasement of municipal suffrage, the system of legislative commissions, and the consequent use of public office for political or pecuniary gain.

The policy of the state in granting charters to municipalities has been diametrically opposed to its policy in the organization of villages. General laws were passed by the legislature for the incorporation of villages as early as 1847, and the control of the expenditure of money for village purposes has been universally retained in the hands of the village tax-payers. On the other hand, no general law has ever been enacted in this state for the incorporation of municipalities, but legislative interference in municipal affairs has become almost the rule. No city charter is safe from legislative attack.

Again, although there is a large and growing proletariat in our cities, all citizens have a voice in the disposition of the moneys raised by taxation, notwithstanding that some of them contribute neither directly nor indirectly to the city treasury. If tax-payers alone are admitted to full village citizenship, al-

though all citizens of villages enjoy the franchise where political issues are at stake, there would seem to be no substantial objection to a restriction of municipal suffrage to municipal taxpayers and rent-payers. If such limitations upon franchise are proper in villages, they seem far more appropriate in large cities, which contain a much larger proportion than villages of the ignorant, degraded and vicious.[1]

Legislative interference in city affairs has assumed protean shapes, but perhaps its worst phase was the appointment of commissions. In 1857, the politics of New York city, always heavily Democratic, were so largely under the domination of the ignorant and corrupt class and their unprincipled leaders that life and property were deemed to be in peril, and a Republican legislature and governor took the control of certain municipal departments from the city and placed it in the hands of the governor and Senate. The system then initiated was gradually extended until a large part of the city's business was transacted at Albany, sometimes by commissioners who were not residents of New York city but were hostile to her interests. A similar centralizing policy was drawing to the capital the control of all municipalities throughout the state. This was the state of affairs when the convention of 1867 sat; and this state of affairs accounts, in part, for the inability of that body to deal with the municipal question. The Democrats of the convention advocated home rule; the Republicans, with much justice, insisted that some of the offices controlled at Albany were state and not municipal offices.

The subject of municipal reform was therefore, naturally, one

[1] "If universal suffrage has worked ill in our larger cities, as it certainly has, this has been mainly because the hands that wielded it were not trained to its use. There the election of a majority of the trustees of the public money is controlled by the most ignorant and vicious of a population which has come to us from abroad, wholly unpractised in self-government and incapable of assimilation by American habits and methods. But the finances of our towns, where the native tradition is still dominant and whose affairs are discussed and settled in a public assembly of the people, have been, in general, honestly and prudently administered. Even in manufacturing towns, where a majority of the voters live by their daily wages, it is not so often the recklessness, as the moderation of public expenditure, that surprises an old-fashioned observer." James Russell Lowell, Democracy and Other Addresses, p. 8.

of the most important topics before the constitutional commission of 1872. As already stated, the commission framed a new article relating to the subject of municipalities (article xv) for addition to the constitution. Mr. Opdyke, chairman of the committee on municipal reform, drew up, in explanation of the article, a report to the legislature which was approved by the commission. According to this report the proper functions of municipal government consist chiefly in keeping the streets, avenues, parks and wharves of a city in proper condition; in the preservation of order; in proper sanitary regulations; in the protection of property from fire and other hazards; in the assessment and collection of taxes; and in the adoption of such local laws as may be deemed most conducive to the comfort and material welfare of the people and to the growth and prosperity of the city. The proper performance of these duties could not, the report declared, injuriously interfere with the civil or political rights of individuals, because these rights are under the guardianship of the state. But in conformity with the attitude taken by Mr. Opdyke in the convention of 1867, the report argued that under municipal government it was clearly right to vest in the holders of property the power to check improper expenditures of money. The report therefore recommended the creation, in each city, of a board of audit, to be chosen by taxpayers and clothed with power to restrain excessive taxation and the lavish or corrupt expenditure of money. The most important provision of the new article was the creation of such a board of audit.

The article also conferred upon mayors increased executive powers. It provided that the mayor of every city, with the consent of the board of aldermen, should appoint heads of departments, and vested in him ample powers of removal. It gave him a veto over acts of the board of aldermen analogous to that given to the governor over the legislature; and it gave boards of aldermen power to pass measures over an executive veto, such as is bestowed upon the legislature by the constitution. The article then proceeded to confer upon every city government exclusive legislative power in all matters relating to tax-

ation and expenditure for local purposes: the care, regulation and improvement of its streets, avenues, public grounds and public buildings, of its supply and distribution of water, of its alms-houses and its other charitable and benevolent institutions, and also such other powers as might be given by law. The article also required the legislature forthwith to enact a general law for the government of cities, in harmony with its terms.

This article did not meet with the approval of the legislature to which it was submitted, nor has it obtained that of any subsequent legislature. As legislative approval was a condition precedent to its submission to the people, the people have never had an opportunity to say whether it ought to be adopted and made part of the constitution.

The Municipal Commission of 1876–77.

Although municipal reform failed in 1874, it was soon again urged by a statesman who had been a member of the constitutional conventions of 1846 and 1867. After Governor Tilden's election to the chief magistracy of the state, he submitted to the legislature a special message relating to cities. The message stated that the convention of 1846 had accomplished nothing in the direction of municipal reform beyond adopting a provision on the last day of its session devolving upon the legislature the duty of enacting laws to protect municipalities against excessive taxation and financial evils similar to those from which the state had suffered prior to 1846. After referring to the fact that, so far from discharging the obligation imposed by the constitution, the legislatures had in reality acted in direct opposition to their duty, and after adverting to the alarming increase in the debts of some of the leading cities in the state, the governor suggested that a commission should be appointed for the purpose of framing some permanent uniform plan for the government of the cities of the state. The message was presented to the legislature on May 22, 1875. On the same day a concurrent resolution was adopted by the two houses, authorizing the governor to appoint such a commission, to consist of not more than twelve persons, "whose duty it should be to con-

sider the subject referred to in said message, to devise a plan for the government of cities, and to report the same to the next legislature." The commission was made up equally from the two great political parties. Its members were William M. Evarts, James C. Carter, Oswald Ottendorfer, William Allen Butler, Joshua M. Van Cott, E. L. Godkin, John A. Lott, Simon Sterne, Henry F. Dimock, and Samuel Hand. The commission organized immediately after its appointment. Its first meeting was held December 15, 1875, and Mr. Evarts was elected chairman. So great was the task undertaken by it that it was unable to report to the legislature of 1876. The legislature of that year therefore extended its time to the session of 1877.

The report submitted by the commission is a most valuable contribution to the discussions respecting municipal reform and is deserving of the most attentive study. It deals first with the evils existing in the government of cities. These, it argues, are two in number: first, the accumulation of permanent municipal debt; secondly, the excessive increase of the annual expenditures for ordinary purposes, which is well illustrated in the case of New York city.

These evils of municipal administration were declared to flow largely from the employment of incompetent and unfaithful governing boards and officers. Without challenging the integrity, intelligence or loyalty of every official in the municipal service, the report justly asserted that, had the cities of this state during the preceding twenty-five years had the benefit in the various departments of local administration of the services of competent and faithful officers, the aggregate of municipal debts would not have been one-third of the present sum nor annual taxation one-half of its present amount, while the condition of these cities in respect to existing provisions for the public needs would have been far superior to what is actually exhibited.

This evil, conjoined with the introduction of state and national politics into municipal affairs and the assumption by the legislature of direct control of local questions, was declared to be responsible for the almost desperate condition of city government.

If [said the commissioners] any one questions the mischievous results of these practices, he has but to note the increase of debt and taxation in the city of New York from 1860 to the present time, during which legislative intervention in the local affairs of that city has been most extensively asserted. The debt has increased from eighteen millions to one hundred and thirteen millions; and the taxation for annual expenditures from nine to twenty-eight millions.

The remedies which the commission proposed were to give municipalities exclusive control over local affairs, and to lodge the choice of the local guardians and the trustees of the financial concerns of cities with tax-payers and rent-payers. The commission argued that the affairs of a municipality are analogous to those of a business corporation; that unrestricted suffrage has no just place in the determination of expenditures for municipal purposes out of the money of tax-payers; that this view was in accordance with the established policy of the state with regard to villages and smaller cities and should be made applicable to all municipalities. Summing up the argument upon this head the commissioners said:

The establishment of a representative body, to be chosen by tax-payers, is, therefore, the proper method by which they can control the question of expenditure and taxation in large cities; but the provisions of the constitution, declaring in effect that all elective officers are to be chosen by universal suffrage, stands in the way of such a procedure. . . . The measure we recommend is not in opposition to the principle of general suffrage but in support of it — as much so as if the sole duty of this commission had been to consider how that principle could be best preserved and perpetuated. No surer method could be devised to bring the principle of universal suffrage into discredit, and prepare the way for its overthrow, than to pervert it to a use for which it was never intended and subject it to a service which it is incapable of performing.

The commission therefore proposed a framework for the local government of cities, to be incorporated in the constitution of the state, of which the following were the principal features:

First: The delegation of the entire business of local administration to the people of the cities, free from legislative interference therewith; reserving to the state its functions of making the general laws under which the local affairs are to be administered, and also a supervision of the manner of administration.

Second: A chief executive officer, clothed with the authority of general supervision and with the unfettered power to appoint the other principal executive officers, except those two (the chief financial and chief law officers), whose duties immediately affect the matter of the public expenditures, and with the power of removal, subject, however, to the approval of the governor.

Third: A board of aldermen, clothed, as now, with all the legislative powers, except such as relate to taxation and expenditure, and elected, as at present, by the people.

Fourth: A separate body, called the board of finance, to be elected by tax and rent payers, with such powers only as relate to taxation, expenditure and debt, its principal functions being to determine the amount of the annual expenditure and to appropriate it to its various objects and purposes. The assent of this body is made requisite to the appointments of the chief financial and law officers.

Fifth: A detailed plan, designed to be complete in itself, for securing efficiency, order and frugality in the financial administration, and to be executed by the board of finance. Its main features are:

1: The determination in each year of the sum of money requisite to be expended for all objects and purposes, and what part thereof is to be raised by taxation, and the levying of the latter sum.

2: The appropriation at the same time of the whole sum to be expended to the several objects and purposes.

3: The certain realization of the entire amount appropriated by compelling the re-levying of deficiencies in the collection of taxes.

4: The prohibition of any expenditure beyond the sums appropriated, by making all contracts or engagements in excess thereof void.

Sixth: A further enforcement of the maxim, "pay as you go," by a prohibition against borrowing money or incurring debt, except under certain specified conditions, not likely to arise often.

Adopting the opinions of Governors Van Buren and Tilden, as expressed in their messages to the legislature, the commission also urged the passage of an amendment separating municipal from state and national elections.

The amendments reported by the municipal commission were approved by the legislature of 1877. As a pre-requisite to their submission to the people, the constitution required their approval by the next legislature thereafter to be chosen. But, as one of the commissioners has since stated:

In the interim between the submission of the report, which had been received at the time of its issue with considerable favor, and its proposed

submission by the legislature, a demagogic cry of "disfranchisement" had been raised against the scheme, because of the creation of a board of finance; and politicians of both parties were apprehensive that any step taken by them to forward the commission's plan by voting for it in the legislature or aiding in having it submitted to the people might result in harm to them; they therefore united in ignoring the work of the commission in the legislature next succeeding the submission of the report; and it thus failed of adoption.[1]

Since the report of the municipal commission to the legislature, two attempts have been made to secure the passage of constitutional amendments for reform in city government. By the first, the legislature of 1881 recommended an amendment to section 2 of article viii — a section, it will be remembered, which was proposed by the commission of 1872 and ratified by the people in 1874, and which prohibited counties, cities, towns and villages from giving money or property or loaning money or credit to any individual, association or corporation or incurring any indebtedness except for county, city, town or village purposes. The amendment recommended in 1881 was chiefly intended to forbid any county containing a city of over 100,000 inhabitants or any such city from contracting any indebtedness, which, with its existing indebtedness, should exceed ten per cent of the assessed valuation of the real estate of such county or city subject to taxation. This amendment was approved by several succeeding legislatures, was submitted for popular ratification in November, 1884, and became part of the constitution on January 1, 1885. The criticism upon this amendment is that the limitation may be evaded by raising the assessment.

In 1882, the legislature recommended a more important amendment. It proposed that general laws should be enacted for the incorporation of cities and incorporated villages, and that full authority should be given to every city to organize its own local government and administer the same for local and municipal purposes, subject only to such general laws as the legislature might enact. All such local governments were required to be

[1] Simon Sterne, Cities, Lalor's Cyclopædia of Political Science.

republican in form. Other provisions of the amendment forbade any city from increasing its permanent debt, raising the rate of taxation or issuing bonds without popular approval to be given by a majority of the electors at a general charter election. Like all its predecessors of similar tenor, this proposition failed to receive the approval of a second legislature and was therefore never submitted to the people.

Five constitutional conventions have been held in the state of New York, in a period of one hundred and ten years; and, excepting the convention of 1801, whose task was limited chiefly to the determination of the true construction of article xxiii of the constitution of 1777, creating the council of appointment, each has reported a complete constitution; and of the four constitutions proposed, three have been adopted. Forty years have elapsed since the holding of the last convention whose entire work was found acceptable to the people of the state. But, as the foregoing pages have shown, the work of amendment has been carried on with great activity during the last fifteen years. Since 1872, many important restrictions upon legislative action have been incorporated in the organic law of the state; among others, restrictions of the power to pass private and local bills, and prohibitions against the creation of state and municipal indebtedness and against granting extra emoluments to state officials or altering their compensation. The governor's term has been lengthened and his veto power enlarged. The right of suffrage has been extended, and bribery on the part of a candidate and the acceptance of a bribe by an elector have been rendered more dangerous if not less frequent.

The method of constitutional amendment by legislative initiation has been frequently resorted to since its first adoption, in the constitution of 1822; and it has given us some of the most important provisions of our fundamental law. Amendments which find their way into a constitution by this means are usually presented singly. They stand or fall upon their own merits or demerits, and are not defeated, although salutary, because of being coupled with provisions which encounter public hostility. While the several articles of an entirely new constitution might

be submitted to the people separately, it would be difficult if not impracticable to submit the articles section by section; and even the several articles have never been submitted singly in the whole history of the state. There are, unfortunately, practical limits in the way of submission of separate sections of separate articles of the work of a constitutional convention which are not experienced when amendments are recommended by the legislature. The convention of 1777 never submitted its work to the people; but the convention of 1821, which was empowered by the act of 1820 to present its amendments to the people together or in distinct propositions as it might deem expedient, concluded to submit them as a whole and as a whole they were approved. The act of 1845 gave the convention of 1846 a like option and its work was ratified as an entirety. The act under which delegates to the convention of 1867 were chosen provided that any amendments or the amended constitution should be voted upon as a whole or in separate propositions as the convention should deem practicable and should by resolution declare. The convention reported that its amendments were interdependent; that, in its judgment, they made a complete and harmonious constitution, and that it was not judicious to take any part from the other to be passed upon by the people separately, excepting only the propositions which, as already stated, were separately submitted. In accordance with this report, the act of 1869 directed that the constitution proposed by the convention should be submitted as a whole, with the exception of the provisions relating to the qualifications of colored voters, to bribery and corruption, assessment and taxation, and of the amended judiciary article; which article, as has been seen, was the only provision which met with popular approval. It is not indulging in too much latitude of inference to assume that many provisions of the excellent work of that convention would have received popular ratification had they been submitted independently of others which were manifestly unpopular.

On the other hand, amendments which have come into being by the method of legislative initiation have always been separately submitted. Ordinarily they have been amendments

of single sections. In 1874, when a large number of amendments were voted upon contemporaneously, the legislature provided for separate submission of amendments relating to different topics. The advantage of this method of amendment is very great; but it suffers from one serious drawback to complete usefulness, namely, that amendments which originate in legislative resolutions do not ordinarily attract sufficient public attention, although the constitution requires that they shall be published for three months prior to the election of the second legislature whose approval is needed before they can be submitted to the people. It is probable that comparatively few voters were aware until they reached the polls, last November, that a constitutional amendment, relating to the formation of a court to facilitate the disposition of appeals to the Court of Appeals, was then to be voted upon.

Public indifference to legislative proceedings operates injuriously in another mode. Many valuable amendments have been lost in the second legislature, for example, the resolutions favoring reforms in city government and the passage of general laws for the incorporation of cities, which in various phases were approved by the first legislature but never carried through another. Without pronouncing that any of these resolutions merited adoption and approval by the electors, it may be justly said that an alert public opinion would never have allowed the people to be thwarted of a chance to vote upon these propositions. If these resolutions were defeated by an adverse public sentiment expressed in a legislature elected with a view to their consideration, there would be no ground of complaint; but that was not their fate; they were lost because politicians were afraid of the effects of their adoption. In fact, the constitutional requirement for submission of amendments to a second legislature has acted as a hindrance to constitutional reform.

A third method of amendment, which is but a modification of the legislative method, has been twice employed in this state, *viz.* the appointment of constitutional commissions to propose amendments to the legislature. Such commissions are likely to contain men of more abundant talent and experi-

ence than our ordinary legislatures exhibit; and, as their number is small, their deliberations are usually conducted with more order and advantage than attend the proceedings of a convention. Judge Jameson has questioned the constitutionality of amendments originating in commissions not expressly provided for in the organic law; but there does not seem to be any reason for assuming that a commission exercises more coercion over a legislature than the public sentiment to which all commissions and legislatures are alike sensitive and alike amenable.

Professor Dicey, in his work on the English constitution, demonstrates the complete flexibility of an unwritten constitution such as that of Great Britain. In point of fact the constitution of a state like New York, open to amendments by either of two methods, approximates closely to the mobility of an unwritten organic law.

Although the people of the state voted two years ago to call a constitutional convention, it may fairly be doubted whether a convention for a general revision of the constitution is necessary. Numerous improvements in our fundamental law appear to be demanded in some quarters; and if it were a question of making a perfect theoretical constitution for the state, doubtless many apparently advantageous changes might be suggested. But prudence dictates that long-established governments should not be changed for light and transient causes. Public sentiment, as Burke was among the first to observe, should be the sole source of alterations in law, and a wise conservatism waits until its tones are imperative. If any amendment is clearly demanded by the people of the state, — particularly by our municipalities, and chiefly by the metropolis, which, through the sturdy independence of its late mayor, has recently forced from the state government an acknowledgment of the city's exclusive control over its own affairs, — it is a constitutional guaranty to cities of the prerogative of local government. It would be easy to demonstrate how deep a hold the doctrine of local government possesses in this country; how, in many states, municipal and town independence is as old as the central authority. The common legal theory of a municipal corporation, as a creature

whose existence may be terminated and whose powers may be revoked by the arbitrary fiat of the state, is to be taken in connection with the larger political truth, that local government is not the creation of state government and that, were the state to revoke a municipal charter, it would break with all just traditions if it should assume to govern the city by central authority.

Municipal reform will, perhaps, never be completed until the mayor of a city becomes its chief administrative officer in fact as well as in name. The theory of vesting the appointment of heads of departments exclusively in the mayor is that responsibility is thus concentrated in the executive and that, as the executive is amenable to the people at short intervals, the control of the administrative machinery is kept fairly in the popular grip. But the theory logically requires that the amplest power of removal should also be given to the mayor. Executive responsibility is defied and brought to naught when a mayor can make an officer but cannot unmake him. The bureau chief then becomes a political Frankenstein. What gave the government of Brooklyn its cohesion during Seth Low's administration was that each chief of department took his office under a pledge to surrender it whenever the mayor should demand his resignation. But a constitutional acknowledgment of municipal independence is one thing; the details of government, another. If cities are ensured the exclusive management of their own local concerns, they may be trusted to work out a system of administration adapted to their conditions and requirements.

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